

CHAPTER 10

LAW OF WAR: METHODS OF INSTRUCTION

References

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3. DoD Directive 5100.77, *DoD Law of War Program* (1998).
4. Dept. of Army, Field Manual 100-5, Operations, Chapter 2, (14 June 1993) [hereinafter FM 100-5].
5. Dept. of Army, Field Manual 27-10, THE LAW OF LAND WARFARE (18 July 1956) [hereinafter FM 27-10].
6. Dept. of Army, Field Manual 27-2, YOUR CONDUCT IN COMBAT UNDER THE LAW OF WAR, 10 November 1984) [hereinafter FM 27-1].
7. Dept. of Army, Regulation 350-41, TRAINING IN UNITS (19 March 1993) [hereinafter AR 350-41].
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9. Dept. of Army, Training Circular No. 27-10-2, PRISONERS OF WAR (17 September 1991) [hereinafter TC 27-10-2].
10. Dept. of Army, Training Circular No. TC 27-10-3, INSTRUCTOR'S GUIDE - THE LAW OF WAR (12 April 1985) [hereinafter TC 27-10-3].
11. Dept. of Navy, Marine Corps Order 3300.3, MARINE CORPS LAW OF WAR PROGRAM (2 August 1984) [hereinafter MCO 3300.3].
12. Dept. of Army, Soldier Training Publication No. 21-1-1 SMCT, SOLDIER'S MANUAL OF COMMON TASKS (1 October 1985) [hereinafter Soldier's Manual of Common Tasks].
13. United States Army, The Judge Advocate General's School, U.S. ARMY, OPERATIONAL LAW HANDBOOK (JA 422)(2001) [hereinafter OPLAW HANDBOOK]

I. INTRODUCTION.

A. Not Just An Extra Duty.

1. Operational Law Training Represents The First Opportunity for Junior Judge Advocates to Practice Operational Law. Operational Law Training, whether it be Code of Conduct, Law of War, Rules of Engagement, or Human Rights Familiarization training is an essential part of what judge advocates do. It represents the first opportunity for most judge advocates to become involved

in the area of Operational Law. In addition, it provides an opportunity for young judge advocates to study this important area of their practice.

2. An Opportunity To Work With Commanders and Operational Planners/Trainers. One of the commander's most important responsibilities is to train his troops to fight wars and successfully execute any type of military operation. Operational law training provides judge advocates an opportunity to become involved in this function. In doing so, lawyers establish important relationships and gain the confidence of other key members of the commander's staff. Judge advocates that display enthusiasm and competence in the construction and execution of a training program forge contacts and build confidence with their client.

II. THE ROLE OF THE JUDGE ADVOCATE.

- A. Generally. Military lawyers have performed remarkably well in the operational law arena because they have a firm grasp upon their role as members of the staff. Their efforts to establish operational law programs has benefited from their relationship with staff members and subordinate commanders.
- B. To the soldier: Trainer. Operational lawyers should remember that they have an important role to play as a unit trainer. They should not, however, confuse this role with their role as advisor to the commander. The training program and training objectives are dictated by the commander. The nature of the training is based upon the advice given by the lawyer and decisions made by the commander. Obviously, the lawyer who has won the confidence of his client will receive valuable latitude in constructing a meaningful and successful operational training program.
- C. To the commander: Advisor. Fortunately, most military lawyers quickly gain the reputation as one of the brightest members of the staff, and this reputation often serves as the foundation for building a training program. Conversely, the judge advocate who briefs his commander on his desire to construct a first rate operational law training program within the commander's unit can the further the confidence of the commander.
- D. Understanding Your Weaknesses. Although the commander, most members of his staff, subordinate commanders, and soldiers respect judge advocates; they also harbor suspicions that military lawyers have not endured the hardships of the field and many of the other experiences that harden soldiers into professional warriors. Although the goal of all Army judge advocates is to become soldiers

who happen to be lawyers, the suspicion referred to above is based upon sound logic. Unlike line officers, military lawyers do not spend very much time in the field, training on military weapons systems and related equipment, or simply learning the art of soldiering. Soldiers and their leaders know this and it generates a suspicion that these “combat JAGs” are not true soldiers, and this creates a credibility gap. Judge advocates must accept this reality and work to reduce the credibility gap.

- E. Reducing The Credibility Gap. The best way to reduce the gap is to never offer the soldiers that you train any evidence that lends credence to their suspicion. You must, without exception, appear as a professional soldier. Your uniform, hair, grooming, and bearing must be flawless. Your command of military terms and vocabulary must be equally impressive. Finally, your knowledge of the unit’s mission, past missions, place in history also serve to reduce the gap. For example, a military lawyer who walks into a battalion classroom and looks as professional (or more professional) as the company commander who introduces him begins his class with the respect that all officers in our Army automatically command. When that same lawyer punctuates his class with informed references to equipment and weapon systems organic to that unit he will find that his audience becomes more engaged with every reference and example that he provides. This is because he has increased the relevance of his class, while bolstering his own credibility. Finally, if that same lawyer has taken the time to read and integrate into his teaching plan examples from the unit’s past operational successes, he will have once again magnified the value of his class.
- F. Mastering The Corporate Model. Recently, members of the Corps have engaged in a quiet debate regarding what MG Michael Nardotti refers to as the corporate model. General Nardotti proffers that the Corps should aspire to a corporate model. Others argue that the Army is nothing like Chrysler Corporation or IBM and that judge advocates must by definition be very different from corporate counsel. A review of the imperatives of a good corporation lawyer reflect that there may be something to the corporate model.
1. For example, a good IBM lawyer must understand his client’s mission, goals, and problems. Similarly, he must be well versed in the client’s personnel issues, its equipment and production techniques. The IBM lawyer must be fluent in the language of technology and automation. Finally, he must be able to grasp the major and subtle issues that confront the industry. In short, he must be *a corporate officer who just happens to be lawyer.*

2. The obligation of the judge advocate is nearly identical to that of the corporation lawyer. He must understand the supported unit's mission. He must understand the tactics, techniques, and procedures of the Army and the supported unit. He must be fluent in the military vocabulary and understand the equipment and weaponry of his unit. Last, he must understand the motivations and imperatives of the military leader and the soldiers who are so ably led. In short, he must be *a soldier who just happens to be a lawyer*.

G. Soldier - Lawyers and Training. The connection between lawyers who have a firm grasp on the profession of arms and good operational training is obvious. Training programs that are constructed by soldiers who happen to be lawyers will prove to be relevant, realistic, interesting, and dynamic.

III. THE TRAINING CONTINUUM.

- A. The Left End of The Continuum. All Army training occurs along a continuum. At one end of the continuum is ineffective training, done simply to satisfy unit training records. It is probably done with little or no thought, without prior planning, and under less than ideal training conditions. The judge advocate who receives the last minute phone call, at 0715, to provide a law of war class to a battalion of soldiers in the brigade basketball gym is the prime example of the shallow end of the training continuum. The trainer will not be prepared. The audience, having just finished physical training, will not be in the proper mode to receive information. Finally, the gym is hot and not designed for its acoustical characteristics. The result is bad training.
- B. The Right End of The Continuum. Training that occurs at the deep end of the training continuum is the product of a well thought out training program that required the lawyer to work with unit leaders and members of the commander's staff. It is part of an overall operational law training program. For example, it is a law of war class taught in a battalion classroom by the supported unit's own noncommissioned officers (who have been trained by the unit judge advocate). It is based upon a training product generated by the lawyer in coordination with unit leaders. The training product is also based upon the nature of the unit, its mission, and its recent operational and training history. Because of these elements it is relevant and realistic. The result is good training.

IV. TRAIN IN THE CLASSROOM OR THE FIELD?

- A. Actually, a good training program offers training in both the classroom and the field environment. The most successful programs report that initial training is

done in the classroom to small groups of soldiers. Level two training is done in a field environment. It is here where reinforcement and correction is made most effectively.

- B. Classroom training should be primarily conducted by the same group of professionals that conduct most of the Army's training: the Noncommissioned Officer (NCO). The operational law training program should provide for training the NCOs first. Judge advocates should conduct this training. Thereafter, judge advocates should continuously evaluate the program by dropping into classes and participating in the training. Many judge advocates recommend team teaching with NCOs as a method of evaluating how unit training is progressing.

V. RELEVANCE AND REALISM.

- A. Build Classes Around The Supported Unit's Mission and Mission Essential Task List (METL). Training that is not relevant to the training audience has no value. For example, if the training audience is made up of an aviation company, law of war training that is focused upon infantry tactics is not relevant and has no value. The best training is based upon familiar terms and mission tasks. This type of training permits soldiers to see the connection between teaching objectives and their assigned tasks.
- B. Use Scenarios. During both classroom and field training events, the use of scenarios allows soldiers to understand legal principles in the operational context. For example, an instructor can tell a classroom of soldiers that they must anticipate attack and respond with force only if they identify a threat that has either (1) been declared hostile, (2) commits a hostile act, or (3) manifest hostile intent. Only a small percentage of students will walk out of the classroom with a firm grasp of what the instructor was talking about. However, had the instructor expressed these principles in terms of real world scenarios, most of the students would have gained a good appreciation for the teaching points.
- C. An example of a Rules of Engagement Scenario. During a Peace Enforcement Operation a patrol of soldiers has frequently witnessed host nation police forces beating host nation civilians. They have been informed that the local police are very dangerous and to avoid encounters with them when possible. The soldiers have, however, a duty to intercede whenever they see an ongoing serious criminal act, such as aggravated assault. Today, they witness a local policeman beating a civilian with the butt of his rifle. As the U.S. patrol moves in, several

policeman reach for their sidearms. How should the members of the U.S. patrol react? The answer is based upon the concept of hostile intent. Based upon the totality of the circumstances, the police officer has manifested hostile intent and the soldiers may now defend themselves using proportionate force (which may include deadly force). Scenarios like this provide an excellent springboard for discussion, wherein, soldiers can ask questions and gain a better understanding of the legal concepts that serve as the foundation for the training standards.

D. Where Possible Use Existing Scenarios and Training Products. Although the prime directive of good training is making the training relevant by tailoring it to the individual unit, this can be done without creating an entirely new training product. The prudent judge advocate will call around to other units and ask for copies of operational law training packages (a number of units have very fine packages; i.e., 1st Armored Division and 82nd Airborne Division). In addition, there is a wealth of training materials found in existing Training Circulars and Pamphlets. Many of these publications are listed under the reference section on page one of this outline.

E. Integrate Recent Training Events or Operations Into The Training Program. One of the best ways to make teaching points relevant is to connect them directly with events that the unit recently encountered during a recent field training exercise or actual operation. The student is able to see why the class is important and how it relates to their real world mission. For example, after discussing a recent training event with the supported unit's commander, a battery commander within Division Artillery, you learn that his unit accompanied deep maneuver forces through its self-propelled or towed capability beyond the Forward Line of Own Troops (FLOT). The battery was very vulnerable during this phase of the operation and moved frequently to prevent the enemy from detecting its exact location. A number of excellent law of war principles could be built into such a scenario. For instance, how should battery soldiers react to discovery by a local civilian, who might travel back to her home and report the unit's location to local authorities?

F. Integrate Unit Weaponry and Equipment into the Training Event. By integrating equipment and weapons familiar to the training audience into training scenarios students immediately become interested in the class. Soldiers spend a great deal of time working with, maintaining, and using unit equipment and weapons. In most instances, soldiers feel that they own these systems and are proud of the capabilities and even the limitations of these items. Making reference to them during operational law training adds realism to the training and makes it more interesting for soldiers that spend most of their waking hours with these systems.

G. Use role players.

H. Evaluate. Establish an evaluation system with goals and milestones. Each soldier should understand whether or not their performance met training standards. Whenever possible, the GO/NO GO evaluation of a field exercise should be supplemented with a comprehensive classroom after action review where soldiers are walked through the training event and where appropriate responses are highlighted and substandard responses are discussed.

VI. WHAT DO WE TEACH?

A. The Law of War: The Soldier's Rules. The Army has established a body of minimum knowledge required by all soldiers.¹ The following basic law of war rules, referred to as "The Soldier's Rules," are taught to all soldiers during their entry level training and again is reinforced by training in units.

1. Soldiers fight only enemy combatants.
2. Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superior.
3. Soldiers do not kill enemy prisoners of war.
4. Soldiers collect and care for the wounded and sick, whether friend or foe.
5. Soldiers do not attack medical personnel, facilities, or equipment.
6. Soldiers destroy no more than the mission requires.
7. Soldiers treat all civilians humanely.
8. Soldiers do not steal. Soldiers respect private property and possessions.
9. Do your best to prevent violations of the law of war; report all violations to your superior, a judge advocate, a chaplain, or provost marshal.

B. Rules of Engagement (ROE). During any type of operation knowledge of the rules of engagement is critical. This is particularly true for Operations Other Than War, where the right to use force is typically more restricted. A number of units have adopted standardized ROE training programs, which focus upon the self-defense measures contained in the CJCS Standing Rules of Engagement

¹ DEP'T OF ARMY, REGULATION 350-41, TRAINING IN UNITS, 14-1 (19 Mar 1993) [hereinafter AR 350-41].

(SROE). These programs establish a base-line ROE training standard, which has the versatility to apply in any type of operation. Soldiers are trained to the baseline ROE and commanders and their staffs on the procedures for receiving, disseminating and supplementing ROE by using ROE conditions or ROECONS. I recommend that judge advocates integrate such a program into their overall operational law training program. The XVIII Airborne Corps recently adopted a standardized base-line ROE program, based upon the mnemonic RAMP.

C. Human Rights Familiarization. In MOOTW, the restoration of basic human rights is often a key mission objective. In such an operation it is important that soldiers understand that they have a two-prong responsibility. First, they must serve as a shining example of a nation that possesses a deep respect for individual human rights. They do this by understanding and conducting themselves in accordance with the basic human rights law. Second, they must be able to recognize human rights violations committed by host nation citizens and government agents (police officers), and know what action to take in regard to such violations. The basic rules are as follows:

1. Respect human life.
2. Treat all persons humanely.
3. Do not commit sexual abuse.
4. Do not torture.
5. Do not take hostages.
6. Report crimes and human rights violations to proper authorities.
7. Avoid the unnecessary destruction of property.

D. Code of Conduct Training.

VII. COMMAND INVOLVEMENT

- A. In planning.
- B. As Integrated Teachers.
- C. Training the Trainers.
- D. In Sponsoring and Lending Credibility To the Program

VIII. PRACTICE POINTERS.

- A. Have Faith in the Student.
- B. Be Enthusiastic - Be an Obvious Believer.
- C. Pose the Right Questions.
- D. Use History and Current Events.
- E. Make it Fun for the Student and Yourself.
- F. Recognize the Importance of your Subject.
- G. Be Relevant and Prepared or Be Somewhere Else.
- H. Stir Their Souls.

IX. CONCLUSION.

OPERATIONAL LAW TRAINING: TOUGH QUESTIONS PRACTICAL EXERCISE

Those who have taught the Law of War are familiar with the doubts concerning this subject often expressed in the classroom and in training areas. These doubts may be manifested in many forms, but the most difficult to counter are those questions based on certain elements of truth and broad generalizations that, while true for a particular time or place (i.e., one-time incidents), do not reflect the norm. Failure to adequately answer or address these questions or statements concerning the Law of War frequently results in the loss of instructor credibility and leads to a further lack of respect for the Law of War. The following discussion addresses some of the more difficult questions associated with the Law of War.

1. “These rules are all well and good, but if no one else follows them, why should we?”

Response: This question incorrectly assumes that the Law of War is not followed by most nations. As all but a small handful of countries have signed and ratified the Geneva and Hague Conventions, there is evidence that the great majority of nations consider the Law of War a binding obligation. Despite lapses, the Law of War has been applied by most nations during armed conflicts. The Falklands War demonstrated, on numerous occasions, the effectiveness of the Law of War in limiting unnecessary suffering (e.g. the British and Argentines shared medical information and established a combat-free medical zone). The Grenada intervention also demonstrated that the Law of War will be applied by most countries when it is in their interest to do so. This concept of national self-interest has always been one of the principal bases for applying the Law of War. Without such self-interest, many, if not most, nations would not adhere to the Law of War. National self-interest is shaped by a number of different factors:

a. **Reciprocity:** This is one of the principal factors influencing adherence to the Law of War. Essentially, this is an international quid pro quo: We adhere to the law because we want other nations to do so. Obviously, if we do not comply with the Law of War, it will not be possible to convince potential or actual adversaries that it is in their self-interest to do so.

- b. **Violations of the Law of War Frequently Lead to Loss of Public Support for the War:** The experience of the U.S. and most other western nations has been that media reports of actual or alleged Law of War violations usually lead to diminished public enthusiasm or support for the war effort. This fact is important from the standpoint that decisions to commit and maintain military forces of democratic nations are much more influenced by public opinion than are similar decisions in totalitarian states. This was a lesson learned time and again during the Vietnam War. The U.S. military will be held to an exceptionally high standard of conduct by the American public.
- c. **Violations of the Law of War May Lead to Increased Enemy Resistance:** When military personnel believe that if captured, they will be mistreated by the enemy, they fight more tenaciously and will not surrender. This situation was graphically illustrated on the Eastern Front in WWII, as the Germans and Russians both mistreated, or were perceived as mistreating, POWs. The Japanese increased their soldiers' will to fight by telling them that, upon capture, they would be mistreated by the Americans. This is a natural human reaction to reports of atrocities by an enemy military force. Throughout our history, slogans, such as "Remember the Alamo" (the killing of all the defenders at the Alamo mission in San Antonio, Texas, during the Texas war of independence) and "Remember Bataan" (the mistreatment of U.S. POWs during the Bataan death march) have served as rallying cries to stir American soldiers to fight more aggressively.
- d. **Violations of the Law of War Detract From Mission accomplishment:** Engaging in random and indiscriminate use of military force is not an efficient use of scarce resources and does not add to the accomplishment of the mission.
- e. **Adherence to the Law of War Is Essential to Internal Discipline:** This is very closely tied to the preceding factor. Military forces are uniformly characterized by their exacting standards of discipline. Adherence to the Law of War adds to, and complements, this internal discipline. As stated above, violations of the Law of War do not advance accomplishment of the mission.
- f. **Adherence to the Law of War Facilitates the Restoration of Peace:** History effectively demonstrates that the enemy of today may well be the ally of tomorrow. At some point in the future, the U.S. will wish to resume normal relations with a past adversary. This becomes, then, a very practical consideration. Most wars have ended with some form of negotiated peace, rather than the complete destruction of the enemy. It is pointless to so embitter an enemy through violations of the Law of War that it becomes impossible to negotiate a peace and a return to normal relations.

Finally, as Americans sworn to uphold the Constitution, our soldiers should know that treaties ratified by the U.S. are part of the supreme law of the land (U.S. CONST. art. VI, cl 2). Thus, the U.S. is bound, by law, to comply with these treaties governing land warfare.

2. “Some of the rules are just ridiculous! For example, how can it be humane to allow the commander to use napalm in combat, but not allow him to use tear gas?”

Response: This statement confuses two separate issues.

- a. The general rule against causing unnecessary suffering.
- b. The Presidential Executive order on Riot Control Agents (E.O. 11850) which is aimed at preventing escalation in the use of chemical weapons.

Napalm is a legal weapon. The same legal targeting considerations that govern the use of other weapons in the U.S. inventory also apply to napalm. These considerations include the following.

1. Is it a lawful target?
2. Are there protected persons or places nearby?
3. Will the use of the particular weapon be indiscriminate in its effect, and, if so, is there another weapon available that will be more discriminate?
4. Is there a military reason for choosing this weapon over another weapon?
5. Will the intended use of the weapon cause unnecessary suffering (that which is needless, superfluous, or grossly disproportionate to the advantage gained by its use)?

E.O. 11850 places limits on the commander’s authority for first use of Riot Control Agents (and Herbicides) in combat situations. The purpose of the E.O. is to ensure that U.S. forces do not initiate offensive chemical actions that might lead to the enemy’s escalated use of lethal or incapacitating agents. The E.O. states that Presidential approval is required for first use and, then, only for essentially defensive measures undertaken to save lives.

3. “If we are on a sensitive mission behind enemy lines and we end up taking prisoners, How can you expect us not to kill them? It is either them or us !!!

Response: This question is presented in many different forms; however, it always describes a situation in which the soldier seems to have no choice but to kill prisoners. As with any hypothetical, you usually have only a few facts upon which to base your decision.

It is never lawful to kill prisoners for operational expediencies. Necessity has been offered as an excuse for many notorious war crimes (e.g., the court-martial of BG Jacob H. Smith for giving the order to a subordinate commander in the Philippines in 1901 to “not burden himself with prisoners” if they impaired the efficiency of his command; or the statement by General Sepp Dietrich of the Sixth Panzer Army prior to the Battle of the Bulge, urging subordinates ... “to remember the victims of Allied bombings of German cities and to shoot prisoners . . . when combat conditions required it.” Sixth Panzer units were involved in the Malmedy Massacre). Once a soldier realizes that this absolute prohibition exists, he is less inclined to rationalize circumstances justifying the murder of prisoners.

To reinforce this prohibition against killing POWs, it is often useful to point out the practical considerations that support the rule.

- a. US soldiers who kill prisoners, and are later captured by the enemy, will likely be tried as war criminals and sentenced to death.
- b. Once the unit has encountered the enemy or has taken POWs, the unit’s presence (and therefore, under the hypothetical, the mission) has been or will soon be compromised. Even if the POWs are killed, they will likely be missed and their unit will initiate a search for them. If they are military personnel (as posed by the hypothetical), their general location will be known, and a search of that area will be conducted if they do not report to their headquarters or parent unit. This fact is true, whether the POWs are protected as the law requires, or killed, as the hypothetical proposes. Therefore, killing POWs may not enhance the likelihood of mission accomplishment.
- c. Finally, killing POWs constitutes murder. Such acts are never kept secret for long, and, once the crimes are reported, the commander must investigate and prosecute the violators.

Advising the soldier that military necessity will not sanction the killing of POWs is only half of the answer. The problem still exists as to what action may be taken with respect to the POWs. Point out to the soldier that this contingency should have been considered in the mission's planning process. As this does not appear to have been done in the hypothetical posed, the options include leaving a guard with the POWs; taking the POWs with the unit; tying the POWs and leaving them (to be picked up or released later); releasing them and possibly limiting their movement by taking their boots and some of their clothing (obviously, their weapons and radio equipment should be confiscated); or, finally aborting the mission.

As noted above, the reasons for not killing POWs, even when such an action might appear to be required by operational expediency, are both legal and practical. The law (both the Law of War and the Uniform Code of Military Justice (UCMJ)) absolutely forbids it. Furthermore, the execution of POWs fails to serve any practical interests of the U.S. military. A failure to rigorously obey the law in this area will lead to mistreatment of U.S. soldiers who become POWs, a loss of home-front support, and, possibly, a renewed will to resist in the enemy.

4. “There were lots of war crimes in Vietnam which were never reported or prosecuted. I know; my brother served there and told me about them. How do you explain that? Won’t our next war be fought the same way?”

Response: As in every war, there were war crimes or violations of the Law of War committed during the Vietnam conflict. If a soldier had knowledge of suspected war crimes, he was obligated to report them. If he did not report them, he was part of the problem. Alternatively, misconceptions concerning the Law of War led people to believe that war crimes had been committed, when, in fact, no violations had occurred. For example many people erroneously believed that the use of a .50 caliber machine gun against individual enemy combatants was a violation of the Law of War.

Based on our experiences in Vietnam, the Army and the Department of Defense recognized that there was a need for more emphasis on Law of War training for U.S. personnel. In 1974, the Department of Defense responded to this concern by publishing Department of Defense Directive 5100.77, “DoD Program for the Implementation of the Law of War.” This directive established, for the first time, a comprehensive Law of War program for all of the armed services. Subordinate commands are directed to “. . . institute necessary programs within their respective commands to prevent violations of the Law of War and ensure that they are subject to

periodic review and evaluation, particularly in light of any violations reported.” Guidance is also provided for the purpose of ensuring that all war crimes are reported and investigated.

There were many investigations and courts-martial in Vietnam for offenses that constituted violations of the Law of War. Many people do not realize that the U.S. prosecuted soldiers for violating the Laws of War because these offenses were charged under the substantive criminal articles of the UCMJ (e.g., the unlawful killing of POWs would be charged as murder under UCMJ article 118). To the uninformed, these cases appeared to be routine criminal cases. In fact, over 240 investigations of alleged war crimes were initiated during the Vietnam conflict. These investigations involved allegations of war crimes committed by, or against, U.S. personnel.

5. “The United States is not really serious about the Law of War, since it did not prosecute all the persons involved in the My Lai massacre. How do you explain that?”

Response: As noted above, U.S. soldiers who commit violations of the Law of War are tried for substantive offenses under the UCMJ. The same procedural safeguards afforded every accused are provided persons charged with violating the Law of War. Sufficient evidence must be available to prove the accused guilty beyond a reasonable doubt. The government will not proceed to trial without sufficient evidence. As frequently happens in criminal cases, the prosecutor may know that a war crime has been committed, and suspect a particular individual, but not have enough evidence to support the case. In the aftermath of the My Lai Massacre, twenty-eight officers (ranging in rank from major general to second lieutenant) were investigated for their failure to stop, or report, the war crimes in issue. In addition to those court-martialed, several individuals received adverse administrative sanctions. It may also be necessary to immunize an accused in order to obtain his testimony against others accused of crimes. This may result in insufficient independent evidence for prosecution of the immunized individual. Moreover, when one accused is less culpable than another in a joint criminal enterprise, the commander may exercise administrative options, rather than prosecuting both individuals. For these reasons, and others, rarely will every individual associated with criminal activities involving a significant number of people (either war crimes or other crimes under the UCMJ) be tried by court-martial.

6. “Didn’t the US and its allies violate the Law of War when German cities were bombed indiscriminately during World War II? Didn’t

the U.S. and its allies engage in carpet bombing of certain urban areas?

Response: There will always be examples of bombing missions that appear excessive or indiscriminate. The loss of life and damage to civilian property caused by the strategic bombing campaigns of World War II resulted from a combination of several different factors. Initially, the Allied Powers announced that they would not attack any civilian population centers, unless the Germans did so first. As the war progressed, it became apparent that Germany frequently targeted civilian population areas (e.g., Warsaw, Rotterdam, Coventry, and London). In reprisal, Prime Minister Churchill ordered attacks on targets in German population areas. These attacks were directed at military objectives, however, such as munitions factories, ball bearing factories, submarine pens, etc.

Several problems contributed to increased civilian casualties. First, high-level bombing was not accurate. This was a particular problem in Germany, as most of the targets were located in urban areas. The enemy's heavy anti-aircraft defenses complicated the bombing missions and frequently led to bombs being dropped over areas that were not targeted. Bad weather and night bombing missions further added to the inaccurate targeting. Finally, some of the Allied bombing of German population areas was undertaken in reprisal for Germany's indiscriminate use of the V-1 (an early version of today's cruise missiles) and the V-2 (the world's first supersonic long-range rocket) against Allied targets in England.

7. “Isn’t it true that if soldiers are going to commit war crimes, they are going to do it anyway? What can a lawyer or a commander do to prevent this from happening?”

Response: This is a false assumption, and the question illustrates a lack of understanding regarding war crimes. Soldiers usually commit war crimes out of a sense of frustration and a lack of proper training and leadership. Following the My Lai massacre, a commission headed by Lieutenant General William Peers conducted an exhaustive investigation of the incident and the subsequent cover-up attempts. In its report, the Peers Commission pointed out a series of significant factors that contributed to the incident. These factors should have alerted the command to the problems that eventually occurred as a result of ineffective command and control. The Peers Commission referred to previous reports concerning the mistreatment of Vietnamese civilians by the troops of Task Force Barker. Yet, even in the face of these reports, there was little in the way of positive enforcement (either disciplinary or judicial

action) designed to discourage this activity. Coupled with the failure of the command to monitor the activities of subordinate units, the inaction led to a permissive attitude in subordinate units.

Numerous studies have been conducted detailing factors contributing to the commission of war crimes by soldiers in combat. Although it is impossible to predict or prevent every war crime, just as it is impossible to predict and prevent every domestic crime on an installation, it is possible to identify factors indicating a high potential for the occurrence of war crimes. With this knowledge, the command can take action to ensure that this potential is not realized. The following are some of the factors that the command and the judge advocate should monitor in order to avert war crimes. (These not only indicate the potential for war crimes, but also indicate potential morale problems for the command).

- a. **High Friendly Losses:** Units sustaining high friendly losses are more prone to seek revenge on the enemy. In the case of My Lai, the Peers Commission found that Task Force Barker had sustained a relatively high number of casualties as the result of the enemy's use of mines and booby traps.
- b. **High Turnover Rate of the Chain of Command:** This was always a problem in Vietnam, as the tour of duty was usually a year. The constantly changing leadership in most units weakened the command and leadership structure, a problem that may also occur in future conflicts.
- c. **A Tendency to Dehumanize the Enemy By Use of Derogatory Names or Epithets:** The Peers Commission found this was common practice in Task Force Barker and contributed to the massacre. Terms such as "gook," "slope," "dink," "kraut," "Jap" "hun" and "bosch," have been used by Americans in past conflicts. In every war, names are developed that inspire hatred for the enemy and, perhaps, make it easier for U.S. soldiers to kill on the battle field. Problems inevitably occur when this attitude carries over to the treatment of enemy civilians and POWs, however. When this occurs, soldiers may begin to view all enemy nationals as less than human and thus treat them with less respect than the law requires.
- d. **Poorly Trained Troops:** The troops assigned to Task Force Barker had received only marginal formal training in several key areas because of accelerated preparation for, and deployment to, Vietnam. These key areas included the Geneva Conventions, POW handling procedures, and rules of engagement (ROE). During any period of prolonged combat, the possibility exists that training will be sacrificed to meet operational requirements. Law of War training frequently receives scant attention

when operational matters are pressing. If this is the case, the judge advocate must ensure that the troops are aware of their responsibilities under the Law of War.

e. **Inexperienced Troops:** This will always be a problem until new troops are tested in combat. The problem can be minimized through the good leadership of battle experienced Nicosia and officers. During the Vietnam War, many of the units either lacked the combat-experienced leadership when they arrived, or were continually infused with inexperienced troops and leadership.

f. **No Clearly Defined Enemy:** This was particularly true in Vietnam. The absence of a clearly defined enemy created a high level of frustration among the regular forces attempting to engage the enemy. The Peers Commission Report stated: “The tactical difficulties in ferreting enemy forces out of populated areas, the practical difficulties involved in clearly identifying friend from foe, and a generally widespread knowledge of VC control of the Son My area unquestionably played a major role in the events of Son My.”

g. **Unclear Orders:** Commanders and their staffs must make their orders as clear as possible in order to ensure correct and expeditious compliance by their subordinates. In the area of war crimes, unclear orders have frequently been the cause, or perhaps the excuse, for the crimes committed. Leaders can sometimes communicate unlawful intent through unclear orders and yet retain the argument that these did not commit a crime.

The example frequently cited is the order, “Take care of the prisoners.” On its face, it appears perfectly lawful. In the My Lai incident, this order was given, and several individuals later testified that they clearly understood that their superior meant for them to kill the prisoners.

Rules of engagement (ROE) may also cause confusion. The terms Free Fire Zones and Specified Strike Zones were used in several of the Vietnam ROE. Commanders declared these zones free of friendly personnel and allowed subordinates to target anything in these areas for specified periods of time. The idea was to free the soldier from having to coordinate with higher headquarters or local political officials before initiating the use of offensive military force. The Law of War requirement to identify proper military targets was implicit in the ROE, but, in many cases, was not clearly stated. As a result, soldiers felt they no longer had any responsibilities under the Law of War in these designated areas. A popular misconception was that, in such areas, the soldier could kill anything that moved, without first determining whether the target was a legitimate military objective. The judge advocate has a responsibility, in

reviewing ROE, to ensure that misconceptions of this nature are clarified or eliminated.

- h. **The Body-count Syndrome:** During the Vietnam War, a decision was made by certain high-level administration officials that, if the war effort could be quantified, a more effective evaluation could be made of the success of U.S. efforts. This idea led to the body-count syndrome. The concept became an evaluation criterion for the success of units and leaders in the field. The all-important body count became the chief concern of many ground commanders and their staffs. This, in turn, led to pressure to ensure that there was a high body count reported at the conclusion of each operation. At lower levels, this pressure sometimes led to the temptation to either falsify the reports or, to a much lesser extent, to target noncombatants.
- i. **High Frustration Level Among the troops:** This is often the sum effect of all of the other factors. Due to their high losses, inability to identify the enemy, lack of proper training and leadership, and unclear orders, the soldiers experienced a tremendously high level of frustration. This was not what they anticipated when they went into combat. Soldiers thus sought something upon which to vent their frustration. The object of this emotional outlet sometimes became enemy personnel under their control (either POWs or civilians). A judge advocate confronted with this situation should immediately advise the commander of this fact, raise the issue with subordinate commanders, and initiate an aggressive training program.

8. “Suppose you are on a combat mission and your unit has taken heavy casualties. One of your own men and a POW are seriously wounded and are both in extreme pain. You only have one ampoule of morphine left. Which person do you give it to?”

Response: This scenario would probably never occur in just this way; however, it does raise the issue of proper treatment of enemy wounded. Enemy wounded must be treated in the same manner, and with the same priority of treatment, as U.S. wounded. The triage concept, which focuses medical attention on the most seriously wounded, must be employed to identify the priority of treatment for all wounded, friendly and enemy alike. Medical personnel must determine which individuals are the most seriously wounded and treat them first. If friendly and enemy wounded have suffered the same extent of injuries and have the same need for treatment, the Law of War does not dictate an order of care, and the decision is left to the attending physician or medic. As initially indicated, a scenario in which all factors appear to be equal, and there exists only enough medicine to treat one individual, is highly unlikely.

9. “I have heard that it is illegal to use Dum Dum bullets, yet it is legal to shoot a person with a .50 caliber machine-gun. This doesn’t make sense, as both forms of ammunition would cause a similar injury or, even more likely, death. How does the Law of War justify this?”

Response: Prior to discussing the legal issues, it is useful to explain how a Dum Dum or similar round differs from a normal bullet. The latter has a regular symmetrical shape and a hard metal coating surrounding the outside of the round. Dum Dums, hollow points, and soft point bullets have irregular shapes and are designed to flatten out upon striking an object, such as the human body, causing damage greatly in excess of that caused by a normal bullet.

Bullets can be designed and manufactured so as to effect this flattening characteristic, or lawful rounds can be altered in order to achieve this effect (e.g. cutting the point off of or removing the steel jacket from a normal bullet).

The prohibition on the use of Dum Dum bullets is based on the Convention on Prohibiting Use of Expanding Bullets, signed at the Hague, Netherlands, on 29 July 1899. This Convention states, in part:

“The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced

The customary practice or usage of nations has adopted this principle as it applies to bullets altered to increase the suffering occasioned by their use.

Hague Convention Number IV, Respecting the Law and Customs of War on Land, dated 18 October 1907, in Article 23 of the Annex to the Convention, states, in part:

“In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . e. To employ arms, projectiles, or material calculated to cause unnecessary suffering” In Paragraph 34b of FM 27-10, the above quoted language has been interpreted to include “irregular shaped bullets . . . and the scoring of the surface or the filing off of the ends of the hard cases of bullets.”

The use of the .50 caliber machine-gun is perfectly lawful under treaty law and the customary practice of states. Large caliber weapons are in the inventories of almost all nations. Obviously, if a .50 caliber bullet is altered in order to make it an irregular-shaped round that would flatten easily in the human body, this would constitute a violation of the Law of War. The fact that, in some situations, the extent of injury

from a Dum Dum would be the same or, possibly, even less than that of a .50 caliber round, does not render the .50 caliber illegal.

10. “Didn’t the United States commit a war crime by dropping atomic bombs on Hiroshima and Nagasaki?”

Response: This is an emotional issue. Seemingly, everyone has an opinion on this issue and, frequently, these opinions have nothing to do with the facts as the U.S. knew them at the time the decision was made to employ atomic weapons.

The U.S. believed that the Japanese government would not accept a demand for unconditional surrender, absent a demonstration of the absolute futility of continued resistance. Although the Japanese Navy and Air Forces had suffered staggering losses to the Allied forces in the Pacific, the Japanese Army still possessed the capacity to continue the fight. The home islands had a well-equipped and well-fed force of over 2 million men. In addition to this, there existed a force of approximately 10 million able-bodied citizens equipped to fight a guerrilla war. The terrain of the home islands was riddled with tunnels and fortified caves in anticipation of an invasion. Throughout the war in the Pacific, no Japanese unit had surrendered, intact, to the Allied forces. There was even less reason to believe that Japanese forces would surrender following an invasion of the home islands.

The Operation Plan for the invasion of Japan, code-named Operation Downfall, had a proposed D-Day of 1 November 1945. The plan estimated that the invasion would require approximately 4.5 million men and that U.S. casualties would number approximately 1 million. Moreover, prior experiences in Okinawa had illustrated the magnitude of potential Japanese casualties. In contrast to the 12,000 American casualties, the Japanese had suffered 100,000 military and 30,000 civilian casualties. The invasion was to occur in stages, beginning with the southern part of the home islands. It was to be the largest single military operation in history, with an initial beachhead of approximately 250 miles. Its scope would dwarf the Normandy invasion of Europe. Finally, even the most optimistic estimates anticipated that it would take one and one-half years to defeat and occupy Japan.

Hiroshima and Nagasaki, both located in the southern part of the home islands, were active centers of the Japanese war effort. Hiroshima served as the headquarters for the Army defending the southern portion of Japan (the intended invasion area). It also functioned as a major military storage and assembly point. Nagasaki was a major seaport and contained several large industrial plants of substantial wartime importance.

Additionally, both cities contained large numbers of “shadow” or “cottage” industries (war goods manufactured in homes and small local factories).

The Japanese had to be convinced that the U.S. was capable of dropping a series of atomic bombs, should resistance continue. The truth was that only two atomic bombs were available at the time. The first was dropped on 6 August 1945, followed by the second on 9 August. The Japanese fear of continued U.S. use of atomic bombs, in addition to their actual effect, led to Japan’s decision to surrender. Lastly, it is important to note that the loss of life suffered in each of the two atomic bomb attacks was less than that suffered in the March 1945 raid on Tokyo in which conventional bombs were used.

APPENDIX B

EXTRACT FROM AR 3504-41, *TRAINING IN UNITS*, 19 MARCH 1993

Chapter 14 Law of War Training

14-1. Overview

This chapter provides general policy for training soldiers on their law of war obligations.

14-2. Personnel requiring training

Soldiers and leaders require law of war training commensurate with their duties and responsibilities. Paragraphs 14-3, 14-4, and 14-5 prescribe subject matter for training at various levels, defined as follows:

- a. Level A. Initial entry level training included in the program of instruction at basic training and at all officer and warrant officer basic courses of instruction.
- b. Level B. Training conducted in units for officer, noncommissioned officer, and enlisted personnel, commensurate with the missions of the unit and the duties and responsibilities of the individual soldier.
- c. Level C. Training conducted at MOS schools, service schools, career courses, the Command and General Staff College, and the U.S. Army War College.

14-3. Level A – initial entry training

- a. Level A training provides minimum knowledge required by all members of the Active Army, Army Reserve, and National Guard.
- b. The following basic law of war rules, to be referred to as 'The Soldier's Rules,' will be taught in Level A training:
 - (1) Soldiers fight only enemy combatants.

- (2) Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superior.

- (3) Soldiers do not kill or torture enemy prisoners of war.

- (4) Soldiers collect and care for the wounded, whether friend or foe.

- (5) Soldiers do not attack medical personnel, facilities, or equipment.

- (6) Soldiers destroy no more than the mission requires.

- (7) Soldiers treat all civilians humanely.

- (8) Soldiers do not steal. Soldiers respect private property and possessions.

- (9) Soldiers should do their best to prevent violations of the law of war. Soldiers report all violations of the law of war to their superior.

- c. Instruction on The Soldier's Rules will stress their military and moral importance in U.S. warfighting.

14-4. Level B – training in units

- a. Unit commanders plan and execute training on the law of war that —

- (1) Is commensurate with the unit mission and the duties and responsibilities of the individual soldier.

- (2) Reinforces the principles set forth in The Soldier's Rules (para 14-3b).

- (3) Is designed, where appropriate, around current missions and contingency plans (including intended geographical areas of deployment or rules of engagement).

- (4) Is integrated, as appropriate, into unit training activities and field exercises.

- b. Commanders should adapt level B training to the specific needs of the unit and its personnel. Subject matter can be

integrated into field training exercises and unit external evaluations. Maximum combat realism will be applied to tactical exercises consistent with good safety practices.

14–5. Level C – training in schools

a. Level C training will emphasize staff and noncommissioned officer responsibility for —

(1) The performance of duties in accordance with the law of war obligations of the United States.

(2) Law of war issues in command planning and execution of combat operations.

(3) Measures for the reporting of suspected or alleged war crimes committed by or against U.S. or allied personnel.

b. Schools will tailor law of war training to the skills taught in those schools, commensurate with the duties and responsibilities of persons attending the school.